Tentative Rulings for October 5, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG03127 ***Navarro v. Sierra Meadows Senior Living, LLC*** **is continued to Wednesday, October 12, 2016, at 3:30 p.m. in Department 502.**

16CECG02259 ***Chaknak v. Al's Autoworld, Inc. dba Porsche of Fresno, et al.*** **is continued to Wednesday, October 19, 2016, at 3:30 p.m. in Dept. 503.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(28) **Tentative Ruling**

Re: ***Delicious Foods, LLC v. Sunsweet Fresh Stone Fruit, LLC***
Case No. 15CECG03406

Hearing Date: October 5, 2016 (Dept. 402)

Motion: By Defendants Wildwood Packing and Cooling, Inc. and Luke Woods, demurring to the Second Amended Complaint brought by Plaintiff Delicious Foods LLC.

By Defendant Giumarra Bros. Fruit Co., Inc. dba Giumarra Companies, demurring to the Fifth Cause of Action in the Second Amended Complaint brought by Plaintiff Delicious Foods LLC.

Tentative Ruling:

To sustain each demurer in its entirety without leave to amend unless Plaintiff can, at the hearing, make an offer of proof as to the matters set forth below.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

The Second Amended Complaint concerns an Operating Agreement entered into between Plaintiff Delicious Foods, LLC ("Plaintiff") and Defendant Wildwood Packing and Cooling, Inc. ("Wildwood") and non-party Michael Bujulian forming Sunsweet Fresh Stone Fruit, LLC in 2010. The Operating Agreement allowed the parties to market various products under the "Sunsweet" Trademark. The Second Amended Complaint alleges that, beginning in 2015, Wildwood breached the Operating Agreement by engaging in behavior competing with Sunsweet, including entering a new sales and marketing agreement with Defendant Giumarra Companies.

The Second Amended Complaint ("SAC") alleges derivative claims on behalf of Sunsweet in the first three causes of action for Breach of Contract, Interference with Prospective Economic Advantage and Breach of Fiduciary Duty. (The Second Cause of Action for Interference with Economic Relations/Prospective Economic Advantage is also alleged derivatively against Giumarra, but Giumarra did not demur to that cause of action.) The SAC also alleges individual claims by Plaintiff against Wildwood for

Breach of Contract and Fudiciary Duty, and against Wildwood and Giumarra for Breach of Economic Relations/Prospective Economic Advantage.

Defendants demur to the first three causes of action in the Second Amended Complaint on the grounds that Plaintiff lacks standing to bring either the "derivative claims" because the allegations of presentment do not comport with the requirements of California Corporations Code §17709.02, subdivision (a)(2). Defendants demur to the remaining causes of action on the grounds that they are not claims independent of Plaintiff's status as a shareholder in Sunsweet.

Defendants Wildwood Packing and Cooling, Inc. and Luke Woods (together, "Defendants") claim that Plaintiff lacks standing for two reasons. First, as to the derivative claims, they argue that Plaintiff has alleged actual compliance with Corporations Code sec. 17709.02, subdivision (a)(2), insofar as the minutes attached to the Second Amended Complaint do not comport with the statutes requirements and there is no legally sufficient allegation of "futility." Second, as to Plaintiff's "individual claims," Defendants assert that the "individual" claims, as alleged, are purely incidental to Sunsweet's claims and, therefore, cannot be claimed in this derivative action.

Defendants also argue that the Second Amended Complaint does not state a cause of action for which relief can be granted.

1) Derivative Claims

Defendants contend that Plaintiff lacks standing to pursue the derivative claims because: (1) Plaintiff did not present the claim *before* filing the initial complaint; (2) the company did not refuse to act, instead actually ratifying Plaintiff's conduct; and, (3) the SAC does not adequately allege that proper presentment would be futile.

Corporations code section 17709.02, subdivision (a)(2) states (in pertinent part) that in order to bring a derivative claim:

> (2) The plaintiff alleges in the complaint with particularity the plaintiff's efforts to secure from the managers the action the plaintiff desires or the reasons for not making that effort, and alleges further that the plaintiff has either informed the limited liability company or the managers in writing of the ultimate facts of each cause of action against each defendant or delivered to the limited liability company or the managers a true copy of the complaint that the plaintiff proposes to file.
> (Cal. Corp. Code § 17709.02.)

Here, Plaintiff has alleged that, after the demurrer was sustained with leave to amend, it offered the action to Sunsweet, and that Sunsweet ratified the present lawsuit.

First, the parties dispute the extent to which the Sunsweet Board could, theoretically, "rehabilitate" the derivative claim. Plaintiff has alleged, and has presented Board Minutes to establish, that the Sunsweet Board has purportedly

"ratified" Plaintiff's actions. In the instance in which a party has filed a complaint alleging a derivative lawsuit, and *then* presents the lawsuit to the corporate board which refuses to act, it is hypothetically possible that this subsequent refusal to act would "rehabilitate" plaintiff's derivative action. It might seem a futile, and, perhaps, strange, exercise to sustain the demurrer without leave to amend as to those claims, so that the plaintiff may bring an identical action post-presentment.

However, the Court need not decide whether this is possible under the statutes, because this is not what has happened here. Instead, the board "ratified" Plaintiff's actions, claiming it would not proceed on its own accord on financial grounds and, moreover, stated that if this Court did not accept this "ratification" it would then pursue the matter. This inaction by the Board appears to fall squarely in business judgment of the Board. (*Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 185-190 ("Where a board of directors, in refusing to commence an action to redress an alleged wrong against a corporation, acts in good faith within the scope of its discretionary power and reasonably believes its refusal to commence the action is good business judgment in the best interest of the corporation, a stockholder is not authorized to interfere with such discretion by commencing the action.") There are no allegations that the Board that made the decision was not disinterested in the outcome. Furthermore, the equivocal response of the Board is not the same as the "refusing to commence" anticipated by the statutes and case law. As a result, based on the pleadings before the Court, Plaintiff cannot pursue the action.

Second, in the opposition, and in the Second Amended Complaint, Plaintiff alleges that it would have been "futile" to bring the action in a timely fashion before the Board of Sunsweet, because one of the Board members was the managing director for Wildwoods. Plaintiff cites to no case authority supporting this argument for futility, nor why one member of the Board, even if so "compromised," would exercise a veto over proceeding with the proposed action. (*See Bader v. Anderson* (2009) 179 Cal.App.4th 775, 790 (pleading of futility must be done with specificity; "demand typically is deemed futile when a majority of the directors have participated in or approved the alleged wrongdoing, or are otherwise financially interested in the challenged transactions").) Plaintiff has simply not pleaded with specificity why presentment would be futile.

Therefore, the demurrer as to the first three causes of action is sustained without leave to amend on these procedural grounds unless Plaintiff can make some offer of proof at the hearing as to why presentment would have been futile or the business judgment rule should not apply under the circumstances.

2) *Individual Claims*

Once again, the parties dispute the impact *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124 has on whether Plaintiff can maintain a cause of action independently of the derivative action. As *Nelson* held, "The cause of action is individual, not derivative, only where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its

origin in circumstances independent of the plaintiff's status as a shareholder." (*Id.* at 124 (internal quotations and citation omitted).)

The *Nelson* court did concede that, in certain circumstances, the same facts may give rise to both a personal and derivative cause of action. (*Id.* (*citing Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530-31.)) However, there still needed to be some action independent of the plaintiff's status. In *Sutter*, for example, the plaintiff was induced to invest and form the corporation on false pretenses, and thus could maintain both individual and derivative actions.

In the Second Amended Complaint, Plaintiff has alleged actions it contends are independent of the putative corporate action. Specifically, in the Fourth Cause of Action for Breach of the Operating Agreement and the Fifth Cause of Action for Interference with Prospective Economic Advantage, Plaintiff contends that in breaching the Operating Agreement by which Plaintiff and Wildwood agreed to run Sunsweet, Defendants injured Plaintiff irrespective of any injury suffered on behalf of Sunsweet itself. However, in neither of these causes of action is there any indication that these claims are based "in circumstances independent of plaintiff's status as a shareholder." (*Nelson, supra,* 72 Cal.App.4th at 124.) The gravaman of these causes of action are based on damages allegedly incurred as a result of breaches of the Operating Agreement. As a result, the gravamen of these claims is that whatever injuries Plaintiff may have incurred, they are incidental to Plaintiff's status as a shareholder in Sunsweet. Therefore, they are derivative in nature and not "direct" claims.

Finally, the Sixth Cause of Action for breach of fiduciary duty premises the existence of the fiduciary duty on the duties owed pursuant to the Operating Agreement. In the Opposition, Plaintiff for the first time premises this fiduciary breach on the duties owed to minority shareholders by majority shareholders. (*Citing Jones v. H.F. Ahmanson & Company* (1969) 1 Cal.3d 93, 106-107.) However, no such allegation regarding majority/minority shareholder rights appears in the Sixth Cause of Action.

The demurrer to the Fourth, Fifth, and Sixth Causes of action will be sustained without leave to amend unless Plaintiff can provide an offer of proof at the hearing as to the existence of a cause of action wholly independent of Plaintiff's status as a shareholder in the corporation.

The demurrer by Defendant Giumarra Bros. Fruit Co. Inc., dba Giumarra Companies to the Fifth Cause of Action is likewise sustained without leave unless the same offer of proof can be made.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/04/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(17)

Tentative Ruling

Re: ***Palmer v. Selma Unified School District et al.***
Court Case No. 15 CECG 00061

Hearing Date: October 5, 2016 (Dept.403)

Motion: Selma Unified School District's Motion for Summary Judgment
Raisin Country Aquatics' Motion for Summary Judgment

Tentative Ruling:

To deny both motions.

Explanation:

Burden on Summary Judgment

In ruling on a motion for summary judgment or summary adjudication, the court must "consider all of the evidence' and all of the 'inferences' reasonably drawn there from and must view such evidence and such inferences 'in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005) 126 Cal.App.4th 1052, 1057-1058.)

As the moving parties, defendants "bear[] an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.) If defendants meet this burden, then the burden of production shifts to plaintiffs "to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid*.)

A defendant who seeks a summary judgment must define *all* of the theories of liability alleged in the complaint and challenge *each* factually; if the defendant fails to do so, he or she does not carry the initial burden of showing the nonexistence of a triable issue of material fact. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165; *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714.)

District's Motion

Cause of Action – Premises Liability

A public entity is liable for injuries sustained on public property only if, among other things, the property was in a dangerous condition at the time of the injury. (Gov. Code, § 835.) Ordinarily, a school district is liable for injuries caused by the dangerous condition of its property. (Gov. Code, § 835; see generally, *Peterson v. San Francisco Community College Dist*. (1984) 36 Cal.3d 799, 809.) However, section 831.7 provides immunity from liability where a plaintiff is injured while engaged in certain sporting activities played on school grounds. (*Yarber v. Oakland Unified School Dist*. (1992) 4 Cal.App.4th 1516, 1519.)

1. Immunity Under Government Code Section 831.7, Subdivision (a):

Under Government Code section 831.7, public entities and employees are not liable to "any person who participates in a hazardous recreational activity" or "or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave" for any injury arising out of that hazardous recreational activity. (Gov. Code, § 831.7, subd. (a).) A "hazardous recreational activity" is generally defined in section 831.7, subdivision (b), as "a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator." The statute defines specific hazardous recreational activities, including "[w]ater contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at the time." (Gov. Code, § 831.7, subd. (b)(1).)

The District points out that there were no lifeguards present, that there were signs to this effect, and that at least one case, *Perry v. East Bay Regional Park Dist*. (2006) 141 Cal.App.4th 1, holds that swimming is "by definition" a "hazardous recreational activity" within the meaning of section 831.7, and concludes that it is immune from Mrs. Palmer's injuries. This is not the case.

Government Code section 831.7 does not, as the District assumes, provide for blanket immunity for spectators watching hazardous recreational activities. To obtain immunity, the public entity must establish that the spectator "knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave." (Gov. Code, § 831.7, subd. (a); See also *Perez v. City of Los Angeles* (1994) 27 Cal.App.4th 1380, 1387 [Legislature explicitly imposed a standard of personal knowledge of the risk of injury as to spectators].) Here, the District has not attempted to introduce evidence as to Mrs. Palmer's knowledge of the risk of injury that the sport of swimming posed to her personally. Accordingly, the District has not meet its burden on summary judgment with respect to the immunity defense.

2. Dangerous Condition of Public Property

Alternatively, the District attempts to establish that the pool deck was not a dangerous condition of public property. A "dangerous condition" of public property is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property ... is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) A condition is not a dangerous condition "if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (Gov. Code, § 830.2.) The purpose of these statutes is to impose liability on a public entity only when there is a substantial danger that is not apparent to those using the property with due care in a reasonably foreseeable manner. (*Biscotti v. Yuba City Unified School Dist*. (2007) 158 Cal.App.4th 554, 558.)

Under these provisions, whether particular facts amount to a dangerous condition ordinarily is a question of fact. But it becomes a question of law, which can be determined by the trial court on summary judgment or by the appellate court on review, if no reasonable person could conclude that the circumstances present a dangerous condition within the statutory definitions. (*Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 704.) Here, the District's argument appears to be that the green hose on the grey pool deck was such that no reasonable person could have failed to see and avoid it. (See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131-132.)

First, Mrs. Palmer contends that she fell over the hose *or* the spigot cover. The District has introduced no evidence to conclusively establish the fall was over the hose or that the spigot cover is also a trivial defect. Second, assuming the fall was over the hose, the District's argument depends on evidence of the visual contrast between the hose and the pool deck, i.e., the color photographs attached as Exhibit 14. Unfortunately, no admissible evidence authenticates them. The declaration of declaration of Kim Korenwinder at paragraph 5 to the effect that the photographs were taken on the day of the incident by Franco Palmer lacks foundation, personal knowledge and is likely hearsay. (Code Civ. Proc., § 473c, subd. (d); Evid. Code, § 1200, subd. (a); *DiCola v. White Bros. Performance Products, Inc*. (2008) 158 Cal.App.4th 666, 681.) Because the fall could have been caused by the spigot cover, and no evidence establishes that the spigot cover was not a dangerous condition, and because no admissible evidence establishes the hose was not a dangerous condition, the District's argument fails.

3. Summary Adjudication Cannot be Granted as to the Remaining Claims

Plaintiffs' complain presents one cause of action, but three counts, each stating a different legal theory: negligence, willful failure to warn [Civil Code section 846], and dangerous condition of public property. (Ott Decl. Ex. 9.) Moreover, Mr. Palmer presents two causes of action. Because the District's motion fails as to the claim for

dangerous condition of public property, this court cannot grant judgment as to any of the other legal theories advanced because the District did not request summary adjudication, only summary judgment in its notice of motion.

Raisin Country Aquatics' Motion

Cause of Action – Premises Liability

In order to establish premises liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages. (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205.) Raisin Country Aquatics ("Aquatics") contends that the duty element cannot be established by virtue of Civil Code section 846.

Section 846 provides, in relevant part: "[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose, except as provided in this section." "Water sports" are specifically included in the definition of "recreational purpose." Section 846 further provides: "[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for that purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of the person to whom permission has been granted except as provided in this section."

Two elements must be established as a precondition for recreational use immunity. First, the defendant must be the owner of an estate or any other possessory or nonpossessory interest in real property. Second, the plaintiff's injury must result from the entry or use of the premises for any recreational purpose. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1100.)

Section 846 presents an "'exceptionally broad and singularly unambiguous' definition of protected property 'interests.' " (*Miller v. Weitzen* (2005) 133 Cal.App.4th 732, 736.) As relevant here, a license, which confers only " 'a personal, revocable and unassignable permission to do one or more acts on the land of another without possessing any interest therein' " (*Beckett v. City of Paris Dry Goods Co*. (1939) 14 Cal.2d 633, 637; accord *San Jose Parking, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1321, 1329), constitutes a qualifying interest under section 846 (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 197.)

Section 846 applies to entry or use of another's land for "any recreational purpose." The statute provides a list of activities that are within the concept of a recreational purpose, but the list is illustrative and not exhaustive. (*Ornelas*, *supra*, 4 Cal.4th at p. 1101.) Whether the plaintiff entered property to personally partake in recreational activity or merely accompanied another who did so is immaterial. "In

either case, his presence was occasioned by the recreational use of the property, and his injury was the product thereof. We discern no meaningful distinction, for purposes of section 846, between the passive spectator and the active participant. Both take advantage of the recreational opportunities offered by the property; neither, therefore, may be heard to complain when injury results therefrom." (*Id*. at p. 1102.)

Here, setting aside whether Aquatics has established the fact of its license to use the Selma High School pool area, the complaint adequately alleges that Aquatics has a possessory interest in the pool area. Thus, Aquatics has established the first element of section 846 immunity. However, Aquatics simply establishes that Mrs. Palmer simply was present at a swim meet, not her purpose or role at that swim meet. Nevertheless, this evidentiary gap is filled by the plaintiffs' evidence which establishes that Mrs. Palmer was present as a spectator for her children's performance at the swim meet. (AMF No. 16.) This adequately establishes that Mrs. Palmer was present for a recreational purpose. Accordingly, the burden flips to plaintiffs to establish that an exception to section 846 applies.

1. Consideration Exception

Under the express terms of section 846, the recreational use immunity afforded by the statute does not apply when entry onto the property on which the injury occurred was "granted for a consideration." (Gov. Code, § 846.) To trigger this statutory exception, the consideration must be paid for "permission to enter" the premises for a recreational purpose or "received from others for the same purpose." (*Ibid*.) Although "consideration is not limited solely to direct payment of entrance fees," it must, at minimum, "consist of a present, actual 'benefit bestowed or a detriment suffered.' " (*Johnson v. Unocal Corp*. (1993) 21 Cal.App.4th 310, 316.) Additionally, whether received directly or from a third party, it must be made "in exchange for 'permission to enter' the property" for a recreational purpose. (*Miller v. Weitzen*, *supra*, 133 Cal.App.4th at p. 740.)

Mrs. Palmer declares: "I was required to pay a fee for my children to participate in the swim meet." A participation fee is equivalent to an entry fee; without it there is no entry and no participation. This fee would clearly prevent the section 846 from applying to the minor children. Because an entry fee may be paid direct or indirectly by others, the fee paid on the children's' behalf, applies equally to Mrs. Palmer. Both the activity of swimming and the activity of spectating are recreational activities. The children cannot swim without paying the fee and the parents cannot not watch the swimming unless their children have paid the fee. Thus, the fee paid directly for the child works indirectly for the parent's admission. Alternatively, a fair inference is that paying the fee on behalf of a child entitles the child to bring an adult or adults with him or her to the meet.

Accordingly, plaintiffs have raised a triable issue as to whether the consideration exception applies to Government Code section 846.

2. *Invitation Exception*

Section 846 immunity does not apply to an injured party who was "expressly invited rather than merely permitted to come upon the premises." (Gov. Code, § 846.) This requires a "direct, personal request" from the landowner to the invitee to enter the property. (*Jackson v. Pacific Gas & Electric Co*. (2001) 94 Cal.App.4th 1110, 1116; *Johnson*, *supra*, 21 Cal.App.4th at p. 317; see also *Ravell v. U .S*. (9th Cir.1994) 22 F.3d 960, 963.)

Here, Mrs. Palmer's declaration only states: "The swim meet was only open to clubs organized under Central California Swimming who were expressly invited to the participated in the swim meet." Her declaration does not establish that *she* was expressly invited to the swim meet, as opposed to members of swim clubs, generally. Accordingly, plaintiffs have not raised a triable issue with respect to the invitation exception under Government Code section 846.

3. *Willful Misconduct Exception*

Section 846 "does not limit the liability which otherwise exists ... for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." "Willful failure to warn" is pled as a separate and alternative theory of liability in plaintiffs' complaint. "Willful" failure to warn is not mere negligence; it involves a more positive intent to harm or to do an act with a positive, active and absolute disregard of its consequences. (*Manuel v. Pacific Gas & Electric Co*. (2009) 173 Cal.App.4th 927, 940.) To prove willful failure to warn the plaintiff must usually show that the defendant had actual or constructive knowledge of the peril; actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and conscious failure to act to avoid the peril. It is sufficient that a reasonable person under the same or similar circumstances would be aware of the " 'highly dangerous character of his or her conduct.' " (*Ibid*.) Whether a defendant had actual or constructive knowledge that injury was a probable result of the danger (not just the possible result) is to be determined by examining all the circumstances, which would include, among other things, that the defendant knew people engaged in recreational activity at the location of the dangerous condition, that the condition had resulted in prior accidents, and the dangerous condition was easily accessible. (*Id*. at p. 946.)

Here, plaintiffs have introduced evidence that Aquatics' Safety Marshal was required to perform a detailed walk through of the swim meet facilities, which includes looking for trip hazards. He is also supposed to complete a checklist confirming that this inspection has been performed. Aquatics' Safety Marshall did not perform such an inspection the day of the incident, nor did he have anyone perform it for him. Plaintiffs argue that it is common knowledge that a hose is a common trip hazard. Because the determination of Aquatics had constructive knowledge of the danger of the hazard is an issue of fact which must be determined by the trier of fact, summary judgment cannot be granted to Aquatics.

Evidentiary Objections – District's Motion -- Plaintiffs' to Teixeira and Korenwinder Declarations

Objection nos. 3, 7, 10, 15, 16, and 17 are sustained, the remainder are overruled.

Evidentiary Objection – District's Motion – Defendant District's to Milich Declaration

Overruled.

Evidentiary Objections – District's Motion – Remainder of District's Objections

The remainder of the objections are to the Additional Undisputed Facts themselves which is improper. Evidentiary objections must be made to the evidence itself. (Code Civ. Proc. § 473c, subd. (b)(5), Rule of Court, rule 3.1354.)

Evidentiary Objections – Aquatics' Motion – Plaintiffs' to Kornwinder's Declaration

Objections nos. 1, 2, 3, 9, 10, and 11 are sustained, the remainder are overruled.

Evidentiary Objections – Aquatics' Motion – Defendant Aquatics to Palmer Declaration

Objections nos. 1, 2, and 3 are sustained.

Evidentiary Objections – Aquatics' Motion – Defendant Aquatics to Milich Declaration

Overruled.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/03/16
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Rene Trejo v. Borga Steel Buildings and Components, Inc., et al.***
Superior Court Case No. 16CECG00111

Hearing Date: October 5, 2016 (Dept. 403)

Motions: Demurrers (3)
Strike (3)

Tentative Ruling:

To overrule Defendant Borga, Inc.'s demurrer. To overrule Defendant Borga Steel Building Components, Inc.'s demurrer. To sustain Defendant Heskett's demurrer, without leave to amend. To grant Defendants Borga, Inc., and Borga Steel Building Components, Inc.'s motions to strike, with leave to amend. To find Defendant Heskett's motion to strike moot.

Explanation:

Demurrer – Defendant Borga Steel Building Components, Inc.

California's Fair Employment and Housing Act ("FEHA") has the same nature and purpose as Title VII of the federal Civil Rights Act, thus California courts may look to federal case law for guidance in interpreting FEHA. (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1316–1317; see also *Horne v. District Council 16 International Union of Painters and Allied Trades* (2015) 234 Cal.App.4th 524, 533.) Two corporations may be treated as a single employer for purposes of liability under Title VII. (*Morgan v. Safeway Stores, Inc*. (9th Cir.1989) 884 F.2d 1211, 1213.) The Ninth Circuit employs a four-part test in determining whether two entities are an integrated enterprise for purposes of Title VII coverage: "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control." (*Kang v. U. Lim America, Inc*. (9th Cir. 2002) 296 F.3d 810, 815; see *Baker v. Stuart Broadcasting Co*. (8th Cir. 1977) 560 F.2d 389, 392.)

In the case at bench, Defendant Borga Steel Building Components, Inc. ("BSBC"), demurs to Plaintiff's Second Amended Complaint on the ground that Plaintiff fails to plead sufficient facts to establish a joint employer or integrated enterprise status between Defendants Borga, Inc., and BSBC.

Plaintiff alleges that Defendant BSBC was a dba of Defendant Borga, Inc., that the two operated out of the same address, used the same phone number, exercised day-to-day control over the same employees, utilized the same personnel forms, performed the same business operations, ran under the same management team, presented themselves as one entity to the public, utilized the same attorney and agent for service of process; that Plaintiff's paychecks and uniform bore the name of Borga, Inc., the company phone was answered, "Borga Steel Building Components," Plaintiff's

personnel documents bore the names of both Borga, Inc., and BSBC, and that Borga, Inc., and BSBC comingled assets and expenses without regard to corporate formalities. Plaintiff has sufficiently pled facts showing Defendants Borga, Inc., and BSBC were an integrated enterprise. Accordingly, Defendant BSBC demurrer is overruled.

Demurrer - Defendant Borga, Inc.

It is a plaintiff's burden to plead and prove the timely exhaustion of administrative remedies to support his or her FEHA claim, which may be done via showing that plaintiff filed a complaint with the state Department of Fair Employment and Housing ("DFEH"), and that DFEH issued a right to sue letter. (*Kim v. Konad USA Distribution, Inc*. (2014) 226 Cal.App.4th 1336; Gov. Code §12965.) Alleging that a complaint was timely filed with the DFEH is sufficient to plead the exhaustion of administrative remedies. (*Williams v. Housing Authority of City of Los Angeles* (2004) 121 Cal.App.4th 708, 721.)

Here, Defendant Borga, Inc., demurs on the grounds that Plaintiff failed to exhaust his administrative remedies against Defendant Borga, Inc., because Plaintiff did not name Defendant Borga, Inc., in Plaintiff's DFEH complaint, has failed to establish a joint employer or integrated enterprise relationship between Defendants Borga, Inc., and BSCB, and the statute of limitations has now run.

Plaintiff's DFEH complaint names BSBC as the respondent. As discussed above, Plaintiff has alleged sufficient facts to support an integrated enterprise theory of liability as to Defendants Borga, Inc., and BSBC. Accordingly, Defendant Borga, Inc.'s demurrer is overruled.

Demurrer – Defendant Heskett

Where a defendant in a civil action was not named in the administrative complaint filed with the DFEH, this may be a sufficient ground to sustain a demurer brought for failure to exhaust available administrative remedies, in a subsequent action. (See *Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 118; *Cole v. Antelope Valley Union High School Dist*. (1996) 47 Cal.App.4th 1505, 1511.)

Here, Defendant Heskett demurs on the ground that he is not named in Plaintiff's original or amended DFEH complaints, that the statute of limitations has now passed, and that because Plaintiff failed to exhaust his administrative remedies before the statute of limitations ran, Plaintiff's alleged claims are now time-barred as against Defendant Heskett. Plaintiff contends that his DFEH complaint sufficiently put Defendant Heskett on notice as to Plaintiff's claims against him.

Plaintiff's original and amended DFEH complaints are on a form that has a specific box to list the alleged perpetrators. Specifically, the form instructs a complainant to list the "employer, person, agency, organization or government entity who discriminated against" him or her. (See SAC, Exh. A.) In the space below this, Plaintiff entered "Borga Steel Buildings and Components, Inc.[;] Jonathan Li, Attorney." In the body of the complaint form, Plaintiff wrote, "One of the more important facts of this situation is that a co-worker named Rudy Aguilar and I had previously in the past

reported this type of behavior and discrimination to the Board of Borga in order to get someone above the CEO Ron Heskett to properly handle the situation." (Ibid.) Nothing in Plaintiff's DFEH complaint states, or even implies, that Defendant Heskett was being charged with wrongdoing. Plaintiff's form seems to indicate that Defendant Heskett had failed to satisfactorily remedy or address discriminatory behavior on another employee's part. This is an insufficient showing of notice that Defendant Heskett was himself being accused of discriminatory acts. The place on the form for listing alleged perpetrators clearly seeks the names of any and all individuals the complainant is accusing of discriminatory acts. Plaintiff did not include Defendant Heskett's name in the respondent area or state in the body of the complaint that Defendant Heskett had engaged in discriminatory behavior or acts. That Defendant Heskett assisted the attorney in drafting Defendant Borga, Inc.'s statement in response to Plaintiff's DFEH complaint does not establish that Defendant Heskett believed he was being accused of wrongful behavior; as a member of Defendant Borga, Inc.'s management staff, it would be expected that Defendant Heskett would be asked to assist in responding to Plaintiff's accusations against Defendant Borga, Inc. Accordingly, Defendant Heskett's demurrer is sustained, without leave to amend.

Motions to Strike – Defendants Borga, Inc., BSBC, and Heskett

Punitive damages are available where plaintiff shows defendant has been guilty of oppression, fraud, or malice. (Civ. Code §3294; see *Roby v. McKesson* (2009) 47 Cal.4th 686.) To survive a motion to strike, plaintiff must support his or her punitive damages allegations with ultimate facts that show entitlement to such relief. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159.) Supporting a claim for punitive damages with conclusory allegations is insufficient. (*Cyrus v. Haveson* (1976) 65 Cal.App.3d 306.) Rather, plaintiff must show that defendant's conduct was of "such severity or shocking character [as] warrants the same treatment as accorded to willful misconduct - conduct in which defendant intends to cause harm." (*Nolin v. National Convenience Stores, Inc*. (1979) 95 Cal.App.3d 279, 286.) Punitive damages may be awarded for FEHA violations, and are based on the standards set forth in section 3294, including the "clear and convincing evidence" standard. (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 221; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147-1148.)

A corporation may be held liable for punitive damages through the malicious acts or omissions of its employees, where those employees have sufficient discretion to determine corporate policy. (*Davis v. Kiewit Pacific Co*. (2013) 220 Cal.App.4th 358, 365.) However, punitive damages may be awarded against an employer based upon the acts of an employee only where the employer (i) had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, (ii) authorized or ratified the wrongful conduct for which the damages are awarded or (iii) was personally guilty of oppression, fraud or malice. (Civ. Code §3294(b).) "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud or malice must be on the part of an officer, director, or managing agent of the corporation." (Ibid.; see also *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 573.) A "managing agent"

is an employee who "in fact exercise[s] substantial authority over decisions that ultimately determine corporate policy. (Id. at p. 953.)

Here, Defendants Borga, Inc., BSBC, and Heskett move to strike Plaintiff's request for punitive damages on the grounds that Plaintiff has failed to allege facts showing oppression, fraud or malice.

Plaintiff alleges that he informed Defendants Borga, Inc., and BSBC ("Defendants Borga") of a back injury that required Plaintiff to engage in light duty at work, and provided a doctor's note with such instructions, but that Defendants Borga failed to honor this request. Plaintiff alleges that instead, Defendants Borga told Plaintiff that the note from Plaintiff's doctor was insufficient and that Plaintiff needed to provide Defendants Borga with a specific questionnaire, filled out by Plaintiff's physician. Plaintiff alleges he provided same, but was still given the same type of work duties as before, and that his supervisor repeatedly made derogatory comments regarding Plaintiff's injury and need for sick days. Plaintiff alleges further that he was unjustly reprimanded and suspended by his supervisor, and that Defendants Borga replaced Plaintiff with a non-disabled Caucasian and placed Plaintiff in a newly created position which in fact involved much more physically demanding work than Plaintiff's previous position. Plaintiff alleges that Defendants Borga engaged in continued harassment of Plaintiff by way of ordering Plaintiff to drive hundreds of miles on very short notice, blaming Plaintiff for errors he did not commit (and in some cases could not have committed), writing Plaintiff up for commonplace production errors that other employees were not written up for committing, and reprimanding and disciplining Plaintiff for actions such as requesting assistance with tasks for which Plaintiff had no training. Plaintiff alleges that his supervisor, who was aware of Plaintiff's back injury and physician's orders to engage in light work duty only, ordered Plaintiff to move a 55-gallon drum, which resulted in further injury to Plaintiff's back. Plaintiff has alleged that these acts were done by his supervisor, Tim Goss, Defendants Borga, and Defendant Heskett, but does not establish that Mr. Goss or Defendant Heskett were officers, directors, or managing agents of Defendants Borga; Plaintiff's assertion that Defendants Borga orchestrated a campaign against Plaintiff is vague as to who exactly is being charged with the acts alleged. Defendants Borgas' motions to strike are granted, with leave to amend. In light of the Court's ruling on Defendant Heskett's demurrer, Defendant Heskett's motion to strike is moot.

Requests for Judicial Notice

The Court takes judicial notice as requested by the parties.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/04/16
(Judge's initials) (Date)

Tentative Rulings for Department 501

(19) **Tentative Ruling**

Re: ***Munoz v. Tarlton & Sons, Inc.***
Court Case No. 13CECG03503

Hearing Date: October 5, 2016 (Department 501)

Motion: by parties for class certification and preliminary approval of class action settlement

Tentative Ruling:

To deem the case complex and order that the complex case fees be paid by October 19, 2016. To restore the case to the active civil list and set December 15, 2016 at 3:30 p.m. in this Department as the hearing date for a contested certification motion.

Explanation:

1. Introduction

There are no declarations of any kind from any party or attorney in this case. Class counsel and defense counsel include in the class persons who admittedly get nothing at all in settlement, but give up all claims "arising out of or related to" "the facts ***and*** allegations" of the lawsuit (emphasis added).

The compliance monitoring provision appears to appoint plaintiffs' counsel as class counsel for ***future*** claims which have not yet occurred, and for clients who have not chosen them as counsel or been given a chance to opt out. The settlement proposes to include all those who worked on construction jobsites in non-exempt jobs during a certain time period, but will provide relief only to those who were not unionized. All the union people get nothing, yet their claims are extinguished.

There is no evidence to support class certification and none to support the settlement. The Court is given no idea of what the claims of three named representatives are, whether any of them are in the class of persons who get nothing, what their jobs are, etc. There is no information as to why the amount of settlement is fair, the potential maximum recovery, the means by which the settlement was calculated, the basis for attorneys' fees, etc.

The lack of evidence means that the motion fails to establish the legal prerequisites for approval, even preliminary approval, as well as for class certification for settlement. The conflict between class members, with some getting nothing, also tends to indicate that proposed class counsel should not be appointed as such. He would bear a heavy burden to explain why he could represent those for whom he seeks representation while providing nothing.

Class counsel's willingness to include people in the class he has decided get nothing is a decided conflict, and one of the reasons that class certifications with settlement are subject to court oversight.

2. Class Certification for Settlement Purposes

A court is not allowed to approve a class settlement absent actual proof of a properly certified class. The only difference in proof for class certification for settlement and class certification generally is that the first does not require proof of manageability for trial. But other than that, the burden of proof is on plaintiff, and must be met, whether certification is sought on its own, or concurrently with settlement approval. The reason for this is to ensure that due process is provided. A class action is a procedural method for adjudicating, or settling, the claims of many via one case. However, the basis for permitting such adjudication or settlement is that the claims of the representatives are typical of the class, and that the representatives are scrutinized to ensure their interests and those of the class they seek to represent are sufficiently similar.

Proof of all class certification requirements but for manageability is required under the United States Constitution. "The Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812. The "clause" spoken of is the 14th Amendment to the U.S. Constitution, the same one that is used to question punitive damage verdicts. See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 712.

The leading case on this issue is *Amchem Products v. Windsor* (1997) 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed 2d 689. Justice Ginsburg wrote that opinion, and she was joined by Justices Scalia, Kennedy, Souter, Thomas, and then Chief Justice Reinquist. The defendants in that case were companies facing asbestos liability, who wanted to completely, globally, settle all possible claims against them. The Court was mindful of the crisis such companies faced in terms of potential financial burdens inherent with liability on those claims.

But it refused to allow the class certification, and therefore the settlement. The objectors to the settlement contended that the named plaintiffs and certain unnamed class members had conflicts of interest, and that counsel did as well in seeking to represent all. This was because the named class members all had manifested injuries from asbestos exposure, while the class certified included persons who did not.

"We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification." (*Id*. at 619.) "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there will be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." (*Id*. at 620.)"

It is not possible to stipulate to a class action. There must be an independent assessment by a neutral court of evidence showing that a class action is proper.

> "[T]he point is that uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the

adequacy inquiry. See *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) - 'A class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.' [citations omitted.] An absence of material conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy and, in turn, to due process for absent members of the class. *Hanlon v. Chrysler Corp.* 150 F. 3d 1011, 1020 (9th Cir. 1998)."

Rodriguez v. West Publ'g Corp. (9th Cir. 2009) 563 F.3d 948, 959.

"[B]ecause absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times. Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only where those differences create conflicts between the named plaintiffs' and the class members' interests."

Berger v. Compaq Computer Corp. (5th Cir. 2001) 257 F.3d 475, 480.

A California court cited *Amchem* in *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 851 (all internal quotations and other citations omitted):

"In order to be deemed an adequate class representative, the class action proponent must show it has claims or defenses that are typical of the class, and it can adequately represent the class. This is part of the community of interest requirement. Where there is a conflict that goes to the very subject matter of the litigation, it will defeat a party's claim of class representative status. Thus, a finding of adequate representation will not be appropriate if the proposed class representative's interests are antagonistic to the remainder of the class. 'The adequacy inquiry … serves to uncover conflicts of interest between named parties and the class they seek to represent.' *Amchem Products, Inc. v. Windsor* . . .) "

The conflict in *Amchem* was between class members with injuries who were to receive compensation and those whose injuries had not yet manifested, who received no compensation. The common factor was asbestos exposure.

Here, there is no evidence establishing any of the required elements for class certification for settlement. Further, the proposed class is all non-exempt employees who worked for defendants at construction jobsites in California from November 8, 2009 through the date of the settlement stipulation (September 12, 2016), some seven years of workers. However, the only persons receiving any money will be class members who were not unionized and who worked from November 8, 2009 to November 7, 2013 – the first four years of the class period. So class members who

worked from November 7, 2013 to December 12, 2016 are required to release all claims for nothing, whether union or not. And all union members release all claims for nothing in return as well.

The compensation/no compensation conflict exists in this case. Counsel therefore has a conflict and cannot be appointed to represent all, which renders the adequacy factor for class certification impossible to establish. "The adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *McGee v. Bank of America* (1976) 60 Cal. App. 3d 442, 487.

3. Settlement Assessment Impossible

See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129: "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement."

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record before the . . . court must be sufficiently developed." (*Id*. at 130.)

In *Clark v. American Residential Services, LLC* (2009) 175 Cal. App. 4th 785, proposed class counsel decreed that the overtime class' claims had "absolutely no value," and that was accepted at face value by the trial court. The Court of Appeal reversed: "While the court need not determine the ultimate legal merit of a claim, it is obliged to determine, at a minimum, whether a legitimate controversy exists on a legal point, so that it has some basis for assessing whether the parties' evaluation of the case is within the 'ballpark' of reasonableness." (*Id*. at 789.)

"While the court must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case, it must eschew any rubber stamp approval in favor of an independent evaluation." (*Id*. at 799, internal citations omitted.) The lack of evidence required denial:

> "Two weeks before the final fairness hearing, class counsel finally provided an evaluation of plaintiffs' case, which described the overtime claim as having 'absolutely no' value. No data was included to support counsel's evaluation and the only data anywhere in the record was a copy of ARS's overtime policy, stating it paid overtime at one and a half times the

> employee's regular rate, along with a couple of pay stubs and time sheets showing some overtime payments to Clark and Gaines). Instead, counsel stated that ARS had "a legally compliant overtime policy and they actually paid overtime premium pay pursuant to their compensation policy."

(*Id*. at 801-802.) Here, there is not only no data, there is no evaluation by anyone.

The provision for compliance monitoring is not explained or supported. I have found only three cases in the United States mentioning class actions and compliance monitoring – none of them feature such monitoring as a settlement provision. This provision appears to be an injunction against further violations of any kind of labor law, without specification, but then attempts to shift enforcement of the injunctive relief to an arbitral forum. It is not appropriate to assign judicial functions for an uncertified class to a person outside of the judiciary. *Luckey v. Superior Court* (2014) 228 Cal. App. 4th 81 (*rev. denied*). As an injunction which is part of a class settlement to be entered as judgment, enforcement is for this Court.

Here, such appears to be a means of setting up class counsel for future cultivation of clients who may be in the class desired here, but for whom future claims have not occurred. Should injunctive relief issue, any violation and enforcement action would be part of enforcement of the settlement and judgment on the settlement in this case.

To the extent that the compliance monitoring process discloses new claims, there may well be persons who are not class members, and it is not possible for class counsel and defense counsel to stipulate to remove such matters from judicial oversight via a private agreement on behalf of persons not presented with claims not yet in existence. Part of the class settlement funds are to be used to monitor compliance although no particular benefit to the class is shown. If violations occur, those who suffer from them can bring claims at that time, with attorneys they choose in a forum of their own desire.

4. Overbroad Release

"The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate as those claims litigated and contemplated by the settlement." *Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700. "A federal court may release not only those claims alleged in the complaint, but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented . . ." *Class Plaintiffs v. Seattle* (9th Cir. 1992) 955 F.2d 1268, 1287.

"[t]he law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual

predicate' as the settled conduct." *In re American Exp. Financial Advisors Securities Litigation* (2nd Cir. 2011) 672 F. 3d 113.

See also *Matsushita Elec. Indus. Co., Ltd. v. Epstein* (1996) 516 U.S. 367, 376-377:

> "[I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action."

The release here includes claims of those who receive no compensation, and for years for which no one receives compensation. It also extends beyond those limited to the identical factual predicate to add claims arising from or related to "allegations" made in the complaint, which could include all legal claims mentioned, whether based on the same facts or not. There is no exclusion for workers compensation claims or unemployment claims (which are commonly excluded from such settlements), neither of which can be subject to determination in this forum.

5. Clear Sailing[1] and Reverter Clauses

The settlement provides for an unopposed fee request of $200,000, along with $15,000 in costs. (See same at 10:2-8.) It also provides that any funds not awarded or collected through the claim process will revert to defendant. No basis for a claim form is given. The form itself and the settlement state that defendants' records are presumed correct absent contrary evidence. The settlement includes no minimum amount to be paid to class members. Class members are required to attest under penalty of perjury that they worked for defendant and did not sign a release, both facts that defendant should already know. So the reverter clause permits a 100% reverter of funds set aside for class members. It all depends on the claim form.

There are cases where claim forms might be needed, to weed out those subject to a defense (like ERISA for example). But the requirement of a claim form must be viewed with a critical eye. It is being used to gain necessary information? Or is it being used as a means to discourage class members from seeking part of the settlement. Here, the claim form is directly tied to defendant getting back a good portion of the proposed settlement. The less the class is willing to go through the claim form process, the less defendant has to pay.

International Precious Metals Corp. v. Waters (2000) 530 U.S. 1223 was a matter where the Court denied certiorari but Justice O'Connor was sufficiently disturbed to issue a written opinion decrying settlements where counsel's fees were divorced from the actual amount recovered for the class: "Arrangements such as that at issue here decouple class counsel's financial incentives from those of the class, increasing the risk

[1] A "clear sailing agreement" is where the defendant agrees not to oppose class counsel's request for fees and costs up to a certain amount.

that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery. They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class."

Her statements were quoted in *Vought v. Bank of America* (C.D. Ill. 2012) 901 F. Supp. 2d 1071, which took a decidedly negative view of the situation (at p. 1099):

> "The terms of the settlement, despite the superficially generous $500,000 cap, ended up being a zero-sum framework where the putative attorneys' fees award cannibalized the funds that would otherwise have gone to the class. Presumably, BANA does not care who it pays so long as it maintains its public image and precludes subsequent actions. Other courts have dealt with the problem of overcompensating the claiming class members by capping each individual member's recovery and directing the residual be paid to an alternate *cy pres* recipient."

The Court also cited *Sylvester v. CIGNA Corp.* (D. Mass 2005) 369 F. Supp. 2d 34, where only 10.8% of the class willing to put in claims. The judge ultimately found that the settlement was not fair at the final fairness hearing. The coupling of a claims-made settlement with a significant reversion to the defendant, along with a "clear-sailing agreement" as to attorney fees, was noted to be particularly odious.

The Court quoted form William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 835 (2003): "It is important to recognize that it would be relatively rare for a plaintiff's attorney to agree to a reverter-fund settlement without also having the security of a clear sailing agreement to reduce the uncertainty in his fee award." Further (*Id.* at 46):

> "[T]he presence of both a reverter clause and a clear sailing clause should be viewed with even greater suspicion and not be presumed fair to the class. Because of the problems inherent in a class settlement agreement that includes both a reverter clause and a clear sailing clause, the Court believes that the presence of these two provisions in any settlement agreement should present a presumption of *unfairness* that must be overcome by the proponents of the settlement."

Accord *International Precious Metals Corp. v. Waters* (2000) 530 U.S. 1223 (J. O'Connor's statement on the denial of certiorari).

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/04/16
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Switzer v. Flournoy Management, LLC, et al.***, Superior Court Case No. 11CECG04395

Hearing Date: **October 5, 2016 (Dept. 501)**

Motion: (1) Switzer's Motion to Compel; (2) Motion for Protective Order by Jordan Schnitzer and Kravitz, Schnitzer & Johnson, CHTD

Tentative Ruling:

To deny both motions. (Code Civ. Proc. §§ 2031.060(a), 2031.310(b).)

Explanation:

The motion for protective order is denied as untimely. The motion should have been filed prior to responding to the discovery. (Code Civ. Proc. § 2031.060(a).) The motion is also unnecessary in light of the ruling on the motion to compel.

Switzer moves to compel production of attorney-client communications pertaining to an allegedly fraudulent document submitted by cross-defendants Jordan Schnitzer and the Kravitz firm, and their attorneys, in support of a motion to dismiss or compel arbitration.

A party moving to compel further responses to demands for production must show good cause for the discovery. (Code Civ. Proc. § 2031.310(b).) Good cause is established by showing that the discovery is relevant to the subject matter of the action and is justified because it is necessary for trial preparation or to prevent surprise at trial. Only after good cause is shown does the burden shift to the responding party to justify their objections. (Weil & Brown, *Cal. Practice Guide: Civ. Proc. Before Trial* (TRG 2016) ¶ 8:1495.6; *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.)

The court finds that Switzer has not shown good cause to pursue this avenue of discovery. The conduct at issue occurred almost three years after the filing of Switzer's cross-complaint, and does not pertain to any of the claims asserted therein.

There are avenues plaintiff can take with respect to this issue, such as bringing it to the attention of the State Bar, but the court is not going to allow plaintiff to embark on a new avenue for discovery that does not directly relate to the claims asserted in the cross-complaint, and further expand the scope of this action.

Additionally, the court finds that Switzer has not made a prima facie showing that the crime/fraud exception applies. "To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer 'were sought or obtained' to enable or to aid anyone to commit or plan to commit a crime or fraud. [Citation.]" (*BP Alaska*

Exploration, Inc. v. Superior Court (1998) 199 Cal.App.3d 1240, 1262.) Switzer's showing is speculative, and Kravitz have explained that the discrepancies are the result of simple clerical errors in creating a retainer agreement by revising a retainer from an unrelated matter as a template. (See Schnitzer Declaration.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/04/16
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Benitez v. Fresno County Private Security***
Superior Court Case No.: 15CECG03594

Hearing Date: October 5, 2016 (**Dept. 501**)

Motion: Demurrer to first amended complaint by Defendants County of Fresno and 21st Agricultural Association dba The Big Fresno Fair

Tentative Ruling:

To overrule, with Defendant County of Fresno to answer the second amended complaint by October 14, 2015.

The Court notes that Defendant 21st Agricultural Association dba The Big Fresno Fair was dismissed on September 14, 2016.

Explanation:

The first amended form complaint adequately alleged compliance with the Government Claims Act by checking box 9(a). This appears to be sufficient for pleading purposes. The Court notes that the second amended complaint, filed without leave of court on September 14, 2016, more than adequately alleges compliance with the Government Claims. Although the Court would ordinarily strike it as being filed without leave of court, it will let the second amended complaint stand as the operative pleading.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/04/16
(Judge's initials) (Date)
)

(17) **Tentative Ruling**

Re: ***Vincent v. Milano Restaurants International Corporation***
Court Case No. 15 CECG 02648

Hearing Date: October 5, 2016 (Dept. 501)

Motion: Motion to Quash Deposition Subpoena

Tentative Ruling:

To grant without prejudice to a new, more narrowly drafted subpoena.

Explanation:

This motion is made under Code of Civil procedure section 1987.1, which authorizes the court to make an order "quashing the subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders." In addition, "the court may make any other order as may be appropriate to protect the person [subject to the subpoena] from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." (*Ibid*.)

Defendant makes a variety of arguments as to why the subpoena should be quashed in its entirety. Only one is compelling.

1. JSA Does Not Have a Protectable Privacy Right in its Business Information

Defendant claims that JSA, a corporation, has a privacy right to its "sensitive and proprietary information regarding Milano's marketing materials, advertising and marketing strategies, and contractual and billing information." This is not the case. While corporations have been found to have a right of privacy, that right has echoed the privacy rights of individuals. Generally the right to privacy contained in California's constitution is limited to "people," i.e., natural persons, not corporations or other business entities. (*Roberts v. Gulf Oil Corp*. (1983) 147 Cal.App.3d 770, 791, 796–797.) However courts do recognize some privacy protection for artificial entities, as distinguished from its members or shareholders: "the nature and purposes of the corporate entity and the nature of the interest sought to be protected will determine the question whether under given facts the corporation per se has a protectable privacy interest ... Two critical factors are the strength of the nexus between the artificial entity and human beings and the context in which the controversy arises." (*Roberts v. Gulf Oil Corp*., *supra*, 147 Cal.App.3d at 796–797; see *Ameri-Medical Corp. v. WCAB* (1996) 42 Cal.App.4th 1260, 1286–1289 [holding that a professional medical corporation retained a privacy interest in financial and employment information]; *H & M Associates v. City of El Centro* (1980) 109 Cal.App.3d 399, 409 [corporations have financial right of privacy].) However, defendant has not cited, and the court is not aware of any case that holds that "confidential, sensitive business information," as opposed to general financial information, is subject to a right of privacy.

To the contrary, only genuine trade secrets are protected by law. The owner of a trade secret has a privilege to prevent disclosure if allowance of the privilege "will not tend to conceal fraud or otherwise work an injustice." (Evid. Code, § 1060.) Thus, unlike other privileges where protection is absolute, the court has power to order disclosure of a trade secret if necessary to prevent fraud or injustice. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1390.) The party claiming the privilege has the initial burden of establishing its existence. The Uniform Trade Secrets Act defines trade secrets in California. " 'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).) Defendant offers no evidence that JSA's "confidential business information" is a trade secret.

Assuming a business entity has a right of privacy; courts must determine whether it is outweighed by the relevance of the information sought to the subject matter in the pending action. "[D]oubts as to relevance should generally be resolved in favor of permitting discovery." (*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court* (2006) 137 Cal.App.4th 579, 595.) Given that a third party witness is presumptively entitled to a protective order to limit disclosure of his or her financial information (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 714; *Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 668), and given that the other business information has not been shown to be "private," the right of privacy will not provide a reason to quash the instant subpoena.

2. Relevancy

Defendant claims the subpoena is entirely irrelevant to the action. It is not. Relevancy is broad. (§ 2017.010 ["Unless otherwise limited by order of the court ... any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved ... if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."].) "For discovery purposes, information is relevant if it 'might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement....' " (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546, italics omitted.) Much of the materials are relevant to verifying defendant's good faith reasons for terminating plaintiff and plaintiff's claim of pretext. For example, the invoices and billing records will establish whether or not defendant actually saved money by outsourcing plaintiff's job to JSA. The communications between defendant and JSA relative to Ms. Waltz will show the scope of Ms. Waltz true duties with respect to JSA which will be relevant to whether Ms. Waltz took over more than one of plaintiff's job functions. Other communications between JSA and defendant will lead to evidence as to whether other employees of defendant took on plaintiff's job functions. Communications between JSA and defendant relating to the outsourcing will be relevant to the reasons for the outsourcing, i.e., whether it was due to the economy, a lack of funds to keep plaintiff, or other reasons.

Furthermore, plaintiff did not need to disclose JSA in discovery to be permitted to subpoena documents from them as a third party witness. Plaintiff's deposition is not a proper place to determine plaintiff's contentions and explore their support. (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1259) Moreover, responses to interrogatories are not a stricture on the scope of discovery. Discovery is fluid and continues during the course of a case.

Lack of relevancy is not a sufficient reason to quash the subpoena.

3. Burden and Oppression

"[S]ome burden is inherent in all demands for discovery. The objection of burden is valid only when that burden is demonstrated to result in injustice." (*West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 418.) In determining whether a discovery demand is unjust, i.e. oppressive, the court determines whether the amount of work required to provide an answer is so great and the utility of the information sought is so minimal that it would defeat the ends of justice to require answers. (*Columbia Broadcasting System, Inc. v. Superior Court* (1968) 263 Cal.App.2d 12, 19.) The party maintaining the objection that the discovery sought is burdensome and oppressive must demonstrate by detailed evidence how much work is required to obtain the requested information. "The objection based upon burden must be sustained by evidence showing the quantum of work required, while to support an objection of oppression there must be some showing either of an intent to create an unreasonable burden or that the ultimate effect of the burden is incommensurate with the result sought." (*West Pico Furniture Co. v. Superior Court*, supra, 56 Cal.2d at p. 417 [declaration of the defendant's manager, alleging information requested could only be obtained by search of records of 78 branch offices without an estimate of total man hours required to accomplish task deemed insufficient]; *Mead Reinsurance Co. v. Superior Court* (1986) 188 Cal.App.3d 313, 318 [1,083.33 man-hours in hand-sorting and manual evaluation of over open 13,000 claims and undetermined number of closed files found sufficient].)

No evidence of burden is submitted with the moving papers. Instead, the declaration of Bruce Batti, and employee of JSA, is submitted with the reply papers. All evidence is to be filed and served with the notice of motion. (Code Civ. Proc., § 1005, subd. (b).) The court has discretion to disregard evidence filed in reply because of the prejudice it presents to the opposing party and does so here. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316

Burden and oppression are not grounds to quash the subpoena.

4. Overbreadth

The subpoena is fatally overbroad in the manner of the subpoena in *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216. *Calcor* held the discovery code "implies a requirement such categories [of documents to be produced in response to a deposition subpoena] be reasonably particularized from the

standpoint of the party who is subjected to the burden of producing the materials. Any other interpretation places too great a burden on the party on whom the demand is made." (*Id.* at p. 222.) The *Calcor* court then found that "a blanket demand … hardly constitutes 'reasonable' particularity." (*Ibid*.) Because the subpoena could be read to simply require the producing party to produce everything in its possession which in any way related to the subject of the litigation, there was no indication that the categories bore any relation to the manner which the third party kept its records. "The burden is sought to be imposed on Calcor to search its extensive files, at many locations, to see what it can find to fit Thiem's definitions, instructions and categories." (*Ibid*.) *Calcor* found this improper and suggested that the subpoenaing party undertake discovery to ascertain what documents actually existed before attempting to obtain them from third parties. (*Ibid*.) The subpoena here at issue is a similar blanket demand.

Plaintiff must redraft her subpoena into categories narrowly tailored to obtain relevant materials.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/04/16
(Judge's initials) (Date)

Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***Phyllis Miller Revocable Trust v. Miller, Jr., et al.***, Superior Court Case No. 08CECG03989

Hearing Date: **October 5, 2016 (Dept. 502)**

Motion: Motion to Strike Answer to Complaint

Tentative Ruling:

To grant and strike the answer of defendant Hunt Financial Corporation only.

Explanation:

Plaintiff moves to strike the answer filed by defendants James Hurst Miller, Jr. and Hurst Financial Corporation on the grounds that they have failed to defend this case, and Hurst is a suspended corporation.

Plaintiff cites to no authority authorizing striking a defendant's answer merely because it has not participated in a few status conferences. The authority cited, Code Civ. Proc. § 436 and *Collins v. Bicknell* (1919) 41 Cal.App. 291, does not provide for this.

However, the answer of Hurst Financial Corporation will be stricken. It is a suspended corporation, and has not responded to this motion seeking dismissal of its answer.

A corporation whose powers have been suspended by the Secretary of State lacks capacity to sue in California courts, and if sued, lacks capacity to defend. (Rev. & Tax. Code § 23301, Corp. Code § 2205; see *Reed v. Norman* (1957) 48 Cal.2d 338, 342 and *Palm Valley Homeowners Ass'n, Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 560.)

"[I]f the corporation's status only comes to light during litigation, the normal practice is for the trial court to permit a short continuance to enable the suspended corporation to effect reinstatement (by paying back taxes, interest and penalties) to defend itself in court." (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1366 [suspended corporation not permitted to renew judgment].) In *Schwartz v. Magyar House, Inc.* (1959) 168 Cal.App.2d 182, the trial court afforded defendant 2 weeks to effectuate revivor of the corporate status.

The court would allow Hunt time for revivor, but Hunt has not responded to this motion or requested time to do so. There seems no point in delaying the striking of Hunt's answer.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/04/16
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Clowers v. County of Fresno***
Court Case No. 13CECG01718

Hearing Date: **October 5, 2016 (Dept. 502)**

Motion: 1) Petition for Compromise of Minor Haley Clowers' Disputed Claim in Pending Action
2) Petition for Compromise of Minor Julianna Clowers' Disputed Claim in Pending Action

Tentative Ruling:

To deny without prejudice.

Explanation:

These petitions cannot be granted as they were not verified by the Guardian ad Litem ("GAL"). Once a GAL is appointed, he remains in this role until removed and replaced, or until the action is entirely completed. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 681, *as modified (Aug. 10, 2005)*—GAL remains in place during appeal, and in fact counsel has no power to appeal absent agreement from the GAL.) "[T]he appointment of a guardian ad litem is subject to ongoing court supervision and the removal of a guardian ad litem, who functions partly as an officer of the court, is a matter within the court's control to be exercised as part of its inherent powers." (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 643-644, *as modified on denial of reh'g (Dec. 23, 2010)*; *In re Hathaway's Estate* (1896) 111 Cal. 270, 271.)

Counsel was instructed in the court's order entered on August 30, 2016, that any *removal* and appointment of a new GAL must be done *by motion*. To clarify, a noticed motion for removal is required, since due process requires that the currently appointed GAL have notice and an opportunity to respond. Removal of a GAL is within the sound discretion of the court, but the reasons therefor must be supported by the record. (*In re Emery's Estate* (1962) 199 Cal.App.2d 22, 26.) As it is, the court cannot determine whether the GAL's current disagreement with this post-judgment settlement results from second thoughts regarding a settlement he agreed to or whether he never agreed to it in the first place. Moreover, there is insufficient detail in the petitions for the court to determine that this agreement, whereby the minors gave up over $80,000 in costs, is in the minors' best interest.

Until either the current GAL verifies the Petitions, or a new GAL is appointed and verifies the Petitions, they are premature. Furthermore, the petitions are also premature because the court has never allocated the wrongful death award between the two claimants, as required. (Code. Civ. Proc. § 377.61.) Distribution should be on the basis of the pecuniary loss of each person individually rather than on the basis of their shares as provided for by the intestate succession statutes. (*In re Riccomi's Estate* (1921) 185 Cal. 458, 462.) The apportionment proceeding is "in the nature of a post-judgment,

ancillary, special proceeding." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 534, *fn* 10.) This apportionment is required whether the wrongful death award is achieved by trial and verdict, or by settlement. (*Corder v. Corder* (2007) 41 Cal.4th 644, 648.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/04/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

(2)

Tentative Ruling

Re: ***Hernandez v. Kim et al.***
Superior Court Case No. 16CECG02060

Hearing Date: October 5, 2016 (Dept. 503)

Motion: Plaintiff's motion to strike answers

Tentative Ruling:

To deny plaintiff's motion to strike the answer of defendant Kim. Plaintiff's motion to strike the answer of defendant Flowers is moot in light of the filing of a first amended answer.

Explanation:

The original answers filed on August 4 and 8, 2016 did contain errors. These errors were not so substantial as to deem them defective or to warrant striking the answers. Reading the pleadings liberally as a whole the court can determine which defendant submitted which answer.

The plaintiff has not properly complied with the procedural requirements for bringing a motion for sanctions pursuant to CCP §128.7. There is no evidence of compliance with the required safe harbor waiting period before bringing a motion pursuant to CCP §128.7.

Plaintiff has failed to demonstrate how CCP §575.2 supports her motion to strike. There is no indication as to which local rule was not complied with that would warrant striking the answers.

The court admonishes defendants to refrain from submitting any documents related to the family law case mentioned in the complaint. That case is a paternity action and is confidential and not open to the public. Documents from that case should not be included in this case as this case is open to the public.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/04/16
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Baker v. Aryan***
Superior Court Case No.: 14CECG01295

Hearing Date: October 5, 2016 (**Dept. 503**)

Motion: By Defendant Saint Agnes Medical Center for summary judgment

Tentative Ruling:

To deny.

Explanation:

Analysis of a motion for summary judgment or summary adjudication is a three-step process. First, the court identifies the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, the court determines whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503; *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548.)

As the party moving for summary judgment, the defendant has the burden to show it is entitled to judgment concerning all theories of liability asserted by plaintiff. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717.)

If a plaintiff pleads several theories, the defendant has the burden of demonstrating that there are no material facts requiring trial on any of them. A moving defendant whose declarations omit facts as to any pleaded theory permits that portion of the complaint to be unchallenged. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 162-163.)

Unless the moving party's showing is sufficient, there is no burden on the opposing party to file declarations showing there is a triable issue of fact. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111.)

The motion by Saint Agnes Medical Center ("St. Agnes") is based on five facts: (1) the fact that the complaint was filed alleging personal injury from malpractice against Defendants for Plaintiff's care and treatment from April 30, 2013 to the present; (2) the allegations of negligence in the complaint (but limited only to the care and treatment of Plaintiff); (3) Howard Tung, M.D., is qualified to render expert opinions as to the applicable standard of care for nurses and other staff employed by hospitals such

at St. Agnes, both generally and as specifically pertaining to Plaintiff's care and treatment while Plaintiff was a patient at St. Agnes, beginning April 30, 2013; (4) based on her education, training, and professional experience, Laura Gaminde, RN, BSN, MBA, CNOR, is qualified to render expert opinions as to the applicable standard of care of nurses and other staff employed by hospitals such as St. Agnes, both generally and as specifically pertaining to Plaintiff's care and treatment while Plaintiff was a patient at St. Agnes, beginning April 30, 2013; (5) St. Agnes, including nurses and related staff, acted at all times within the applicable standard of care while rendering services to Plaintiff during the time periods relevant to this lawsuit. (Statement of facts.)

The motion fails because it leaves unaddressed the allegations of the complaint in ¶10 that St. Agnes breached its duty to select, review, and periodically evaluate the competence of the physician defendants. (See *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 341.) A moving defendant whose declarations omit facts as to any pleaded theory permits that portion of the complaint to be unchallenged, and the motion must be denied. (*Teselle v. McLoughlin, supra,* 173 Cal.App.4th 156, 162-163.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/04/16
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Meyers v. Meyers***
Case No. 16 CE CG 01870

Hearing Date: October 5th, 2016 (Dept. 503)

Motion: Plaintiff/Cross-Defendant Shelia Meyers' Demurrer to Cross-Complaint of David Meyers

Tentative Ruling:

To sustain the demurrer to the first, third and fourth cross-claims, with leave to amend, for failure to state facts sufficient to constitute valid causes of action. (Code Civ. Proc. § 430.10, subd. (e).) To overrule the demurrer to the fifth cross-claim. Defendant/cross-complainant David Meyers shall serve and file his first amended cross-complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

It appears the most of the claims in the cross-complaint are actually derivative claims that should have been brought by David Meyers (hereinafter "David")[2] on behalf of the corporation, not on his own behalf, so they fail to state valid causes of action.

" ' "It is a general rule that a corporation which suffers damages through wrongdoing by its officers and directors must itself bring the action to recover the losses thereby occasioned, or if the corporation fails to bring the action, suit may be filed by a stockholder acting derivatively on behalf of the corporation. An individual [stockholder] may not maintain an action in his own right against the directors for destruction of or diminution in the value of the stock...." ' [Citation.]" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124.)

While an individual shareholder may bring his or her own separate claims for harm, even if the harm arose out of the conduct of the corporation's managers, "an individual cause of action exists only if the damages were not incidental to an injury to the corporation. [Citation.] The cause of action is individual, not derivative, only ' "where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a shareholder."' [Citation.]" (*Ibid*.)

Here, the first cause of action for breach of fiduciary duty is alleged in the title to be "As to Corporation." (Cross-Complaint, p. 7:11.) The cross-complaint goes on to

[2] The court will refer to the parties by their first names to avoid confusion. No disrespect is intended.

allege that, "**As an officer, manager, and director within the corporation** Bantus, Inc. (the 'Family Business'), Sheila Meyers **owed to the corporation fiduciary duties of care and loyalty**, requiring that she perform her duties in an ethical and honest manner, **in the best interests of the entity**, and according to the applicable standards of fiduciary care." (Cross-Complaint, ¶ 20, emphasis added.)

"In acting as described above, including but not limited to driving Jason Meyers out of **the business**, leaving **the business** with no succession plan, and refusing without substantial justification to sign the application for the renewal of a revolving line of credit **upon which the corporation depended** for viability, Sheila Meyers breached those fiduciary duties of care and loyalty, thereby **causing harm to the corporation** in an amount to be proven at trial but, upon information and belief, no less than $500,000.00." (*Id*. at ¶ 21, emphasis added.)

These allegations make it very clear that Shelia is accused of harming the corporation by violating her fiduciary duties owed to the corporation, not to David personally. While David argues that Shelia also owed him a fiduciary duty as his wife and that she breached this duty when she interfered with the plan to transfer the corporation to his son, the cross-complaint expressly alleges that Shelia breached the duty she owed to the corporation as an officer, manager and director of the corporation, not as a spouse to David. In addition, the harm is alleged to have been to the corporation, not to David himself. While there may have been harm to David as well, the allegations of the cross-complaint make it evident that the primary harm was to the corporation.

Also, David has already alleged a separate cause of action alleging that Shelia breached her marital fiduciary duty to him, so the first cause of action would merely be duplicative of the second cause of action even if it did allege breach of spousal fiduciary duties. Therefore, the first cause of action fails to state facts sufficient to constitute a valid cause of action, as it has not been brought as a derivative claim. Thus, the court intends to sustain the demurrer as to the first cause of action. However, the court will grant leave to amend to allow David to allege the claim as a derivative action and that he either served a demand on the board of the corporation, or that service of a demand would be futile. (*Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1618-1619; Corp. Code § 800.)

Likewise, the third cause of action for intentional interference with prospective economic relations also fails to state a claim as to David, since the only harm alleged is to the corporation. David alleges that "Cross-Complainant is, **through the corporation**, and at all relevant times was in numerous economic relationships with actual and potential customers. These economic relationships would have resulted in economic benefits to Cross—Complainant." (Cross-Complaint, ¶ 29, emphasis added.)

"In a direct and intentional effort to disrupt those relationships, Sheila Meyers engaged in a pattern of wrongful conduct including, but not limited to, the following: (i.) Unduly **preventing the corporation's agents and employees** from engaging in reasonable marketing efforts; (ii.) Refusing, without substantial justification, to authorize

a line of credit **upon which the corporation depended** to meet customer needs." (*Id*. at ¶ 30, emphasis added.)

David also alleges that "Cross-Complainant's economic relationships with **its customers**. **Potential customers, and employees** were indeed disrupted, and Cross-Complainant suffered substantial economic harm as a direct and proximate result of that disruption." (*Id*. at ¶ 32, emphasis added.)

Again, these allegations clearly show that Shelia's conduct interfered with the corporation's business relationships and prospective relationships with its customers, not with David's personal relationships. While David offers to amend the cross-complaint to allege that the harm was to him as well as the company, he has already alleged that he had no other business or source of income outside of the company (Cross-Complaint, ¶ 25), so it does not appear that he could allege any interference with prospective economic relationships that was not primarily harmful to the corporation. Therefore, the court intends to sustain the demurrer to the third cause of action, with leave to amend to allow David to reallege the claim as a derivative action.

Next, with regard to the fourth cause of action for negligent performance of duties, David alleges that, "From 2009 through and including approximately 2015, **Sheila Meyers was an employee of the Bantus, Inc. corporation**. As such, she had a legal duty 10 use ordinary care and diligence in **performing her job responsibilities**, following the directions of **her employer**, adhering to the policies of **her employer**, and using her skills to most effectively carry out her responsibilities. In doing the actions described hereinabove, Sheila Meyers violated these duties by negligently performing those tasks which were integral to **her employment**." (Cross-Complaint, ¶ 34, emphasis added.)

"This negligent or careless professional conduct represents a violation of, without limitation, sections 2856, 2858, 2859, and 2865 of the California Labor Code." (*Id*. at ¶ 35.)

Once again, these allegations show clearly that David is alleging a breach of Shelia's duties as an employee of the corporation, and that her conduct harmed the corporation. In particular, his citations to the Labor Code demonstrate that David is alleging a breach of her employment duties. However, the alleged breaches only show harm to the corporation itself, not to David personally. Any harm to David resulting from Shelia's breach of duty as an employee would be incidental to the harm to the company. Therefore, David's claim should have been brought as a derivative claim, as he has no standing to allege an injury to the corporation on his own behalf.

Shelia also argues that the economic loss rule prohibits David from suing her for negligence under the circumstances. However, the economic loss rule does not apply to the present situation.

"Economic loss consists of ' " ' "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property...." ' " "[Citation.]' [Citation.] Simply stated, the economic loss rule provides: ' " ' "[W]here a purchaser's expectations

in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." ' This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." [Citation.] The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. [Citation.] Quite simply, the economic loss rule 'prevent[s] the law of contract and the law of tort from dissolving one into the other.' [Citation.]" (*Robinson Helicopter Co., Inc. v. Dana Corp*. (2004) 34 Cal.4th 979, 988.)

Thus, the economic loss rule applies primarily to cases where a product fails but does not cause any injuries other than to the product itself. (*Ibid*.) Here, there are no allegations that David purchased any "product" from Shelia, that the product was defective and failed, or that it caused any harm to itself but not to anyone or anything else.

While Shelia cites to several cases in support of her position that the economic loss rule has been applied outside of the context of product liability cases, those decisions are inapplicable here. For example, *Colome v. State Athletic Com*. (1996) 47 Cal.App.4th 1444 held that, "A defendant can be held liable for economic harm inflicted upon a third party with whom he has no direct dealings only when the policy criteria that determine whether a duty should be found are met." (*Colome*, *supra*, at p. 1459.)

" 'Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law. Privity of contract is no longer necessary to recognition of a duty in the business context and public policy may dictate the existence of a duty to third parties....'" (*California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1135, quoting *Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 57–58.)

Thus, the cases cited by Shelia in her reply deal with a different variation of the economic loss rule, where a third party is injured by the failure to perform a contract, or the negligent performance of its terms. Here, David is not alleging that he was a third party to a contract who suffered economic loss from the breach or negligence performance of the contract, but rather that Shelia failed to carry out her job responsibilities to the company of which he was a member, thus causing injuries to him and the company. Such a negligence claim is not covered by the economic loss rule. Therefore, the court will not sustain the demurrer to the fourth cause of action based on the theory that it is barred by the economic loss rule. However, the court intends to sustain the demurrer to the fourth cause of action for failure to state facts sufficient to state a claim, as discussed above, with leave to amend.

Finally, the court intends to overrule the demurrer to the fifth cause of action for declaratory relief. Shelia argues that David has failed to allege the existence of a justiciable controversy that would justify declaratory relief.

" 'A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court. [Citations.] If these requirements are met and no basis for declining declaratory relief appears, the court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to [a] favorable declaration. [Citations.]'"' [Citation.]" (*Market Lofts Community Association v. 9th Street Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 931, quoting *Ludgate Ins. Co. v. Lockheed Martin Corp*. (2000) 82 Cal.App.4th 592, 606.)

Here, David alleges that, "An actual controversy has arisen and now exists between David Meyers and Sheila Meyers with respect to the continued operation of the Bantus, Inc. corporate entity. Sheila Meyers seeks to continue running the corporation as a going concern and asks for the Court to impose upon that corporation a neutral director or receiver. David Meyers, on the other hand, believes that the corporation, which does business as David Meyers Construction, exists essentially as a result of his labor and customer relationships. He is in excess of sixty (60) years old and is not interested in spending several more years performing the difficult physical labor and long hours that framing work involves. He wishes to wind up the business and transition into retirement."

Thus, David has alleged an actual controversy exists between himself and Shelia regarding whether to wind up the corporation or continue it in operation, and he asks for a declaration that he has a right to wind up the corporation and retire. While Shelia claims that David's allegations are speculative and vague, they appear to be sufficient to show that the parties have an actual dispute regarding their legal rights and duties under the bylaws of the corporation. As a result, the court intends to overrule the demurrer to the fifth cause of action.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/04/16
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Kratly v. County of Fresno***
Superior Court Case No.: 15CECG01760

Hearing Date: October 5, 2016 (**Dept. 503**)

Motion: By Matt Bickel, Conservator of the Estate of Defendant Mark Carlson Lee on petition to approve settlement for person with legal disability under Probate Code section 2506

Tentative Ruling:

To deny, without prejudice to bringing the petition in the probate division of this court.

Explanation:

Probate Code section 2506 provides [italics added]:

> *Where approval of the court in which the guardianship or conservatorship proceeding is pending is required under this article*, the guardian or conservator shall file a petition with the court showing the advantage of the compromise, settlement, extension, renewal, or modification to the ward or conservatee and the estate. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

The conservatorship proceeding is not pending in the unlimited civil division of the Superior Court of Fresno County, it is pending in the probate division. It is the probate division of the court that would need to determine the advantage of the compromise to the conservatee Lee and his estate, not the unlimited civil division of the court.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/04/16
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Hubbell v. Anderson et al.***, Superior Court Case No. 14CECG03710

Hearing Date: **October 5, 2016 (Dept. 503)**

Motion: Edward Fletcher's Demurrer to Cross-Complaint in Interpleader

Tentative Ruling:

To overrule. (Code Civ. Proc. § 430.10(e).)

Explanation:

As the court held in its July 19, 2016 order granting leave to file the cross-complaint, interpleader is appropriate here.

> Any person, firm, corporation, association or other entity against whom double or multiple claims are made, or may be made, by two or more persons which are such that they may give rise to double or multiple liability, may bring an action against the claimants to compel them to interplead and litigate their several claims.

(Code Civ. Proc. § 386.)

A complaint in interpleader must show that "the defendants make conflicting claims to [the subject matter], and that the [plaintiff] cannot safely determine which claim is valid and offers to deposit the money in court...." *(Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 608.)

"The purpose of interpleader is to prevent a multiplicity of suits and double vexation." (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1125.) The *mere threat* of a lawsuit, if such a suit would be completely unfounded, is insufficient to justify an interpleader action. *(Westamerica Bank v. City of Berkeley, supra,* 201 Cal.App.4th 598, 612-613.)

In *City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1123, the court found no interpleader appropriate where:

> "… Seltzer and the Firm assert the right to different things, debts or duties owed from different obligors. The debt claimed by the Firm is the Fees; the obligor is the City. The debt claimed by Seltzer is compensation under the Firm's internal agreements; the obligor is the Firm. The fact that the amount of money due Seltzer under the Shareholder's Agreement and other agreements with the Firm may be partly based upon the amount of

the Fees from City does not alter the fact that the debt owed Seltzer is due from the Firm under her agreements with the Firm."

Selzer in that case affirmed under oath that she never made any claim for fees from the City. Here, Hubbell placed a lien for her fees on the client's case, and lifted it only when there was an agreement that provided the amount she sought would be withheld from the client until her dispute was resolved. The lien was withdrawn without prejudice, and Hubbell has not clearly disclaimed any interest in the settlement funds. This situation is different from that in *Morgan Hill*.

This case is more akin to *Southern California Gas Company* (2014) 232 Cal.App.4th 477, which held that the real question is whether the holder of the funds might be subjected to double lawsuits, not whether there was a threat of double liability. That case involved two parties (an attorney and a former client) claiming right to certain settlement funds. That is also the situation between Hubbell and Fletcher where the money held in Anderson's trust account is at issue. So the dispute over the trust funds is one appropriate for interpleader. Accordingly, the demurrer is overruled.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/04/16
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***In re: Insurance Claim of Stewart***

Case No. 16CECG01880

Hearing Date: October 5, 2016, (Dept. 503)

Motion: Order to Show Cause re: Dismissal for Lack of Jurisdiction.

Tentative Ruling:

The case is ordered dismissed.

Explanation:

This Court, on its own motion, set a hearing for an Order to Show Cause re: dismissal for lack of jurisdiction. Plaintiff, in the supplemental briefing, argues that it is mandated by Code to investigate insurance claims, thus supporting its jurisdictional allegations. Plaintiff did not, however, address the Court's concerns regarding service of the subpoena or the relevance of the documents sought.

As noted in that order, the Complaint or Petition in this case lists in the caption that it is between Plaintiff and the claimants, but the substance of it is to merely seek a case number for purposes of a subpoena.

Plaintiff is correct that, in certain circumstances, subpoenas may be issued. But the statutes cited are not applicable here. Code of Civil Procedure §2035.010, *et seq.* sets out a procedure to be followed to secure discoverable information, but that is not the procedure followed here. Likewise, the subpoena power is available for an uninsured motorist claim, but that has not been alleged either. (Ins. Code §11580.2, subd.(f).) There appears to be no statutory basis for the petition on file here.

Moreover, there is nothing that indicates that there is even a dispute: as far as can be determined, the claimants are merely seeking their insurance proceeds. To invoke a court's jurisdiction, there must be presented to the court "a genuine and existing controversy, calling for present adjudication as involving present rights." (*Housing Group v. United Nat'l Ins. Co.* (2001) 90 Cal.App.4th 1106, 1111.)

In opposition to the Order to Show Cause, Plaintiff argues that it is statutorily mandated to investigate potentially false claims. (*Citing* Ins. Code §§1875.20-1875.24.) However, Plaintiff has cited to no authority holding that this duty gives the courts jurisdiction to issue subpoenas in support of such investigations absent a case or

controversy. Simply put, parties cannot confer subject matter jurisdiction on a court. (*Housing Group, supra,* 90 Cal.App. 4th at 113. Therefore, because there is no justiciable controversy, this case is dismissed.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 10/04/16
(Judge's initials) (Date)